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Edward Mountain MSP
Convener
Net Zero, Energy and Transport Committee
Scottish Parliament
By email: netzero.committee@parliament.scot

CC. UKSIs@parliament.scot

8 September 2023

Dear Convener

The Public Service Obligations in Transport Regulations 2023 EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to proposals by the Scottish Ministers to consent to the making of UK secondary legislation affecting devolved areas arising from EU Exit.

That protocol, as agreed between the Scottish Government and then Parliament, accompanied the letter from the then Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, to the Conveners of the Finance & Constitution and Delegated Powers and Law Reform Committees on 4 November 2020 and replaced the previous protocol that was put in place in 2018.

I attach a Type 1 notification which sets out the details of the SI which the UK Government propose to make and the reasons why I am content that Scottish devolved matters are to be included in this SI. Please note, we are yet to have sight of the final SI and they are not available in the public domain at this stage. We will, in accordance with the protocol, advise you when the final SI is laid and advise you as to whether the final SI is in keeping with the terms of this notification.

Extensive engagement has been required between the Scottish Government and the UK Government's Department for Transport to work through the proposed SI to ensure respect for devolution. Agreement was only reached on the final drafting points on 31 August 2023, and this has resulted in the notification being issued later than is ideal, and as a consequence will not provide the Committee with the 28 days required to consider a notification.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

St Andrew's House, Regent Road, Edinburgh EH1 3DG
www.gov.scot

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.
I look forward to hearing from you by 6 October 2023.

Yours sincerely

FIONA HYSLOP

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Notification Template

NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SI(s) (if known) or a title describing the policy area

The Public Service Obligations in Transport Regulations 2023

Is the notification Type 1 or Type 2

Type 1

A brief overview of the SI (including reserved provision)

The Public Service Obligations in Transport Regulations 2023 (PSOTR) are included in the UK SI programme which forms part of the UK Government's Retained EU Law (Revocation and Reform) Act 2023 ("REUL Act") implementation and will revoke and replace EU Regulation 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road ("R1370").

R1370 is directly applicable retained EU law which makes provision about the creation of public service obligations and the award and subsidy control treatment of public service contracts in relation to rail and road transport. It sets out sector-specific procurement and subsidy control rules, which are generally less onerous than the regimes applicable to other contracts for services or service concessions granted by contracting authorities under the Public Contracts (Scotland) Regulations 2015, Utilities Contracts (Scotland) Regulations 2016 and Concession Contracts (Scotland) Regulations 2016. R1370 relates to reserved matters (namely public service obligations in respect of rail and subsidy control) and devolved matters (namely public service obligations in respect of road transport).

PSOTR revokes R1370 and replaces it with bespoke procurement and subsidy control rules in respect of public service obligations for rail and road transport services. The framework created by PSOTR largely mirrors R1370 in terms of its practical effect and accordingly maintains a process for creating public service obligations and awarding public service contracts for rail and road transport which is generally less onerous than the processes in place under general procurement law.

Certain of the rail direct award powers under R1370 are due to expire on 25 December 2023 under a sunset provision in R1370. Part of the DfT's rationale for revoking and replacing R1370 is due to its wish, in particular, to reinstate the powers to make direct awards of rail public service contracts. This would in principle also enable the Scottish Government to continue to make direct awards in the same way that they can now. This is effectively a matter of reserved UKG policy since the process for awarding rail contracts is a reserved matter.

The effect of PSOTR largely mirrors R1370 and in awarding a public contract under the Public Contracts (Scotland) Regulations 2015 (based on EU Directives).

Officials are of the view that the provisions contained in the PSOTR would not negatively impact Scotland's alignment with the EU, with the possible exception of reserved rail matters. It may be necessary to consider this further in the event of constitutional change.

The PSOTR are made under sections 14(1) of the Retained EU Law (Revocation and Reform) Act 2023.

The PSOTR are planned to be laid on **16 October 2023**.

Details of the provisions that Scottish Ministers are being asked to consent to.

The Scottish Ministers are being asked to consent to the provisions of the PSOTR which relate to public service obligations and contracts for road transport services since these are devolved matters.

As R1370 is being revoked and replaced on a UK basis and contains a mix of reserved and devolved provision, it is more practical and efficient for the revocation to be made on a UK wide basis.

Does the SI relate to a common framework or other scheme?

No

Summary of stakeholder engagement/consultation

The UK Government has consulted with all devolved administrations and has continued to engage with Transport Scotland over the SI.

A note of other impact assessments, (if available)

The UK Government has not undertaken a full impact assessment on the basis that no significant impact is foreseen on the private, voluntary or public sector.

Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation

The PSOTR will largely maintain in force the current rules in relation to public service obligations for rail and road passenger transport services under R1370, These include processes for the Scottish Ministers to award rail passenger contracts (subject to the provisions of the Railways Act 1993) and processes for local transport authorities to award concession contracts in respect of local bus services. Given that both R1370 and the PSOTR establish a legislative framework applying to devolved and reserved transport modes it is considered expedient to consent to the PSOTR being made on a UK basis. The Scottish Ministers are content that the policy reflected in the PSOTR, including the application of different procurement objectives in relation to contracts being awarded by Scottish contracting authorities, demonstrates respect for devolution.

Officials are of the view that the provisions contained in the PSOTR would not negatively impact Scotland's alignment with the EU, with the possible exception of reserved rail matters. R1370 currently contains broad-ranging direct award powers

in relation to public service contracts for rail, allowing such contracts to be awarded without a competition, when permitted by domestic law (which is principally found in the Railways Act 1993). These provisions are due to expire at EU level on 25 December 2023 under a sunset provision in R1370, but are being retained as a matter of domestic law in the PSOTR. This matter is reserved to the UK Parliament, though it may be necessary to consider this further in the event of constitutional change.

Intended laying date (if known) of instruments likely to arise

UK Government intends to lay the SI on 16 October 2023

If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?

Agreement was only reached on the final drafting points on 31 August 2023, and this has resulted in the notification being issued late, and as a consequence will not provide the Committee with the 28 days required to consider a notification.

Information about any time dependency associated with the proposal

PSOTR includes provisions to reinstate the powers to make direct awards of UK rail PSO contracts which are due to expire on 25 December 2023 under a sunset provision in R1370.

Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

No

Any significant financial implications?

There are no significant financial implications.

SI NOTIFICATION: SUMMARY

Title of Instrument Public Service Obligations in Transport Regulations 2023 (PSOTR Regulations)
Proposed laying date at Westminster 16 October 2023
Date by which Committee has been asked to respond No later than 6 October 2023
Power(s) under which SI is to be made The PSOTR are made under sections 14(1) of the Retained EU Law (Revocation and Reform) Act 2023.
Categorisation under SI Protocol Type 1
Purpose The PSOTR will revoke and replace existing EU Regulation 1370/2007 on public service obligations in the field of passenger transport ("R1370"). The PSOTR will also make consequential amendment to primary legislation and secondary legislation.
Other information N/A
SG Policy contact: Oi Hang Chu